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SUPREME COURT, U.S.

No. 98-115

In The

Supreme Court of the United States

October Term, 1997

ANDREW LEE MITCHELL,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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JURISDICTION

The State of Texas respectfully excepts to the jurisdiction of this Honorable Court to consider the second question presented by Petitioner.

STATEMENT OF THE CASE

Keith Wills was shot in the back of the head at a firecracker stand he was operating in Smith County, Texas; money was taken from the stand. On the morning of December 27, 1979, Game Warden Ralph East was one of the first peace officers on the scene. The next day, Sheriff's deputy Kelly Stroud wrote a report that he had been by the stand shortly after midnight and that he had seen someone in the stand. Investigators had no leads until a few weeks later when Edward Owens, while being questioned on an unrelated matter told peace officers that he, Petitioner, and Petitioner's son were involved in the capital murder of Keith Wills. Owens negotiated a deal for immunity, Petitioner's son, Anthony Mitchell, negotiated a deal for a probated sentence; they both testified against Petitioner at his trial. At trial the accomplice testimony showed that the murder occurred between 8:00 and 10:00 p.m. on December 26, 1979, and that Petitioner was "ingesting drugs and whoring from 10:00 p.m. on through the rest of the night." *See Ex parte Mitchell*, 853 S.W.2d 1, 4 (Tex.Cr.App.), *cert. denied*, 510 U.S. 864 (1993). The report of Deputy Stroud was not introduced in the 1981 jury trial. Warden East was called as a witness in the 1981 jury trial and testified about what he saw when he arrived at the scene. Petitioner was convicted by a jury

and found guilty of the capital murder of Keith Wills; the same jury returned answers to the special issues and a sentence of death was pronounced by the judge.

Petitioner filed a state writ of habeas corpus and evidentiary hearings were held in 1989. The record of the writ hearing in 1989 shows that Stroud's report was discovered by Assistant District Attorney Frank Henderson in 1989 pursuant to an order by the trial court to review the Sheriff Department's files and that the report was immediately turned over to Petitioner. Also, the record of the 1989 hearing shows that Stroud's report was never provided to anyone in the District Attorney's office before or during the 1981 jury trial.

The State of Texas excepts to the presentation by Petitioner that any motive was ever attached to the failure of the Sheriff's Department to divulge the report to the District Attorney's office and to Petitioner before or during his 1981 jury trial. There has been no showing that the failure to divulge Stroud's report was intentional on the part of either the Sheriff's investigators or the District Attorney's office. The only evidence is that the Sheriff's investigators have said they thought they gave the report to the District Attorney's office and the prosecutors who prepared and tried the case in 1981 did not remember such a report by Deputy Stroud.

During the 1989 writ hearings Henderson found a note in the prosecutor's files, in the handwriting of former Assistant District Attorney Mike Patterson, which referred to observations made by Game Warden East. This note appears to be Patterson's pretrial interview with Justice of the Peace Guthrie, who related that East

had been by the firecracker stand during the night of the murder. Based on this note, East was called and testified at the 1989 writ hearings that he had been past the firecracker stand between 10:00 and 12:00 p.m. on December 26, 1979, that he had seen someone in the stand, and that he thought he had told the Sheriff's investigators. There was no evidence at the 1989 writ hearing that anyone talked to East before the 1981 jury trial about what he saw the night of December 26, 1979. Former Assistant District Attorney Patterson, who tried the case in 1981, for then District Attorney Hunter Brush, did not review the notes he made in his prosecutor files, in 1980-81, before he testified in the 1989 writ hearing. Before the pretrial hearing in 1996, another note in Patterson's handwriting was found in the prosecutor's files which showed that Patterson had interviewed East before the 1981 trial and there is a notation that East had been by the firecracker stand that night and had seen someone in the stand.[1] At the pretrial hearing in 1996, Patterson was not served with a subpoena by Petitioner to testify and no evidence to explain the 1980-81 prosecutor's notes is in the record.[2]

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[1] Former Assistant District Attorney Frank Henderson found a note in 1989 in Patterson's files that led to East's testimony in the 1989 writ hearing. Henderson, by 1996 an Assistant United States Public Defender in Beaumont, Texas, testified at the 1996 pretrial hearing that he did not remember seeing the direct note of East's observations when he reviewed the prosecutor's file in 1989. Assistant District Attorney David Dobbs found this second note in preparation for the 1996 pretrial hearing and made Petitioner aware of the note the same day.

[2] Patterson was out of the State at the time of the 1996 pretrial hearing. The State and Petitioner asked that the hearing be

The State of Texas excepts to the presentation by Petitioner that any motive was ever attached to the failure to divulge the content of East's observations to Petitioner before or during his 1981 jury trial.

The State of Texas excepts to the presentation by Petitioner that any motive was ever attached to the acts of former Assistant District Attorney Henderson in preparation for and during the 1989 writ hearings. Henderson's acts at the 1989 writ hearings were responsible for the discovery of the exculpatory evidence that Petitioner has and which resulted in the reversal of his 1981 conviction and remand for new trial. Henderson did not locate all of the notes from files closed 8 years before he had to review them, but he discovered enough so that all exculpatory evidence, both from Stroud and East, was disclosed at the 1989 hearings. Further the State of Texas excepts to the suggestion that any of Henderson's acts at the 1989 writ hearings is relevant to any of the events surrounding the 1981 jury trial.

The State of Texas excepts to the presentation of Stroud's report and East's observations as stating that they had seen the victim alive in the firecracker stand. Neither Stroud nor East could identify who they saw in the stand, they only said that they remembered someone being in the stand.

The State of Texas also excepts to the presentation of Stroud's report and East's observations as evidence that exonerates Petitioner. While the evidence is exculpatory

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continued until Patterson was available to testify. The trial judge would not continue the hearing.

and contradictory to the State's theory of the case in the 1981 jury trial, it does not exonerate Petitioner under the standard of review for the sufficiency of the evidence, *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and does not implicate the constitutional protection against a conviction based on no evidence or legally insufficient evidence.

SUMMARY OF THE ARGUMENT

First Question Presented

Petitioner has not been able to show that there was intentional misconduct which would entitle him to the review he seeks. Since the facts do not support Petitioner's claims, there should not be a review of the case to determine whether to increase the scope of the Fifth Amendment's jeopardy provisions.

Second Question Presented

Petitioner has not shown that there is jurisdiction to determine the validity of the denial of discretionary review by the Texas Court of Criminal Appeals. In the alternative, the issue was sufficiently addressed by the 12th Court of Appeals in Tyler, Texas on direct appeal.

REASONS FOR DENYING THE PETITION

I.

THERE IS NO SHOWING OF INTENTIONAL MISCONDUCT BY THE STATE OF TEXAS TO WARRANT CONSIDERATION OF WHETHER TO EXPAND THE INTERPRETATION OF THE CONSTITUTION.

Petitioner has failed to understand and has misstated the holdings of the appellate courts of Texas, the federal circuits, and of this Honorable Court and he has failed to present an argument based on the question he wishes to present for review.

The record of this case shows that before and during the 1981 jury trial, there was a failure to divulge material, exculpatory evidence which undermined the reviewing court's confidence in the outcome of the jury trial. *Ex parte Mitchell*, 853 S.W.2d at 6. During the 1996 pretrial hearing, nothing was developed to inform any court of the reasons that the prosecutors and the Sheriff's Department investigators did not divulge Stroud's report and East's observations to Petitioner before or during his 1981 jury trial. In the opinion of the Texas Court of Criminal Appeals which reversed Petitioner's conviction in 1993, there is no descriptive adjective which alludes to the motive or scienter for the failure to divulge the exculpatory evidence. Again, in the opinions of the 12th Court of Appeals for Tyler, Texas and the Texas Court of Criminal Appeals, when analyzing Petitioner's claims after the 1996 pretrial hearings, there was no finding that the State acted with intent or that there was a motive or scienter to

prevent an acquittal.[3] *Mitchell v. State*, 963 S.W.2d 532 (Tex.App. – Tyler 1996) *aff'd sub nom. Ex parte Mitchell*, No. 1493-96 (Tex.Cr.App. November 19, 1997). The Court of Criminal Appeals, in a footnote, rejected Petitioner's characterization of its holding in 1993 reversing the conviction, saying that "it is difficult to accept [Petitioner's] assertion [that] the State intentionally or knowingly suppressed evidence it knew would result in [petitioner's] acquittal." *Ex parte Mitchell*, No. 1493-96, slip op at 10, n.6 (*see also* Petitioner's App. A at 13-14).

Indeed, it would be extraordinary for the lead prosecutor to have "intended" to hide the exculpatory evidence of East and still call East to the stand to testify in the 1981 jury trial, and hope that the defense would just fail to ask the right question to elicit exculpatory facts, "in the hope of heading off an acquittal."

Petitioner's entire argument for expanding the interpretation of the constitution is based on two facts that are not present in this case; a finding that the State acted with intent to deprive Petitioner of the exculpatory evidence that he was entitled to receive before or during the 1981 jury trial, and a finding that the prosecutors acted with the intent to prevent an acquittal that they believed was certain, before the 1981 jury trial, in the absence of the failure to divulge the evidence. Petitioner's unsupported

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[3] The 12th Court of Appeals addressed Petitioner's points on appeal as purely issues of law and not of fact. To conduct the analysis the Court chose to "assume without deciding" that intentional misconduct had been shown. *See* (Petitioner's App. at 26).

claim that he has proven "the lead prosecutor . . . intentionally suppressed" evidence is a mischaracterization of what has been developed about the failure to divulge evidence and he has mischaracterized the holdings of Federal Circuits and the Texas appellate courts. The standard suggested in dicta, but not followed in *United States v. Wallach*, 979 F.2d 912, 916 (2nd Cir. 1992), *cert. denied*, 508 U.S. 939 (1993), nor in *United States v. Catton*, 130 F.3d 805 (7th Cir. 1997), was that there might be a protection if two facts are shown, intentional misconduct and misconduct intended to abort a trial when acquittal is certain. The 7th Circuit has twice clearly rejected the offer to extend *Kennedy*, of adopting the dicta in *Wallach*. While analyzing the appellant's claims against the very dicta they assert they declined to adopt, the 7th Circuit has never found that the dicta in *Wallach* states a correct interpretation of the Fifth Amendment to the United States Constitution. "Rather, in [the 7th] Circuit, all that bars retrial under *Kennedy* is the prosecution's intent to abort the trial." *United States v. Doyle*, 121 F.3d 1078, 1086 (7th Cir. 1997),[4] *also Catton*, 130 F.3d at 807-08. The State excepts to the presentation of the holdings of the federal circuits as supporting the dicta in *Wallach* when no court has followed that dicta.

The State of Texas excepts to the presentation of the law that the opinion of the Texas Court of Criminal Appeals is in conflict with relevant decisions of this

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[4] The 7th Circuit noted that *Doyle* had not, in any case, met the standard suggested in *Wallach* and declined to decide whether to adopt that exception which was "expressly reserved." *Doyle*, 121 F.3d at 1087.

Court. The opinion of the Court of Criminal Appeals clearly identifies the holding in *Kennedy* as the standard of review and that the critical factor, absent in this case, was a showing of intentional misconduct designed to avoid an acquittal. The Texas Court of Criminal Appeals has not misinterpreted nor failed to follow established law in deciding an important federal constitutional issue.

The State of Texas excepts to the presentation of the opinion in *Catton* as holding that there is no difference between covert and overt misconduct. The opinion observes "[t]here is an argument" and "[i]t can be argued" that there is no distinction between overt and covert error designed to evoke a mistrial, but that "*Wallach* does not hold that the argument is sound, but in considered dictum concludes that it may well be sound." *Catton*, 130 F.3d at 807. The 7th Circuit did not "bite the bullet" and did not decide whether there was a distinction between overt and covert misconduct designed to abort a trial that would have otherwise ended in an acquittal. *Id.*

The State of Texas excepts to the presentation of the law that the opinion of the Texas Court of Criminal Appeals is in conflict with the federal circuit courts. None of the federal opinions, to which Petitioner cites, have found that misconduct would bar retrial unless the misconduct had the goal of preventing an acquittal that the prosecutor knew was certain in the absence of the misconduct. It is not objectively reasonable to suggest that misconduct, the failure to know about or divulge exculpatory evidence, which occurs before the jury is selected could ever possibly be construed to have been committed "to prevent an acquittal that the prosecutor believed at

the time was likely to occur in the absence of his misconduct." *See Wallach*, 979 F.2d at 916.

The State of Texas excepts to the presentation of the law that the opinion of the Texas Court of Criminal Appeals decides a federal issue which is in conflict with other state courts of last resort. Petitioner complains this conflict is based on the interpretation of the various state constitutions and the rights those constitutions protect for their citizens. That is the purpose of federalism, the very foundation of this nation, and there can be no review of how individual states interpret their constitutions so long as the rights protected by the United States Constitution are maintained.

The State of Texas excepts to the presentation of the law that the opinion of the Texas Court of Criminal Appeals is a "dangerous resolution of the issue [which] threatens to undermine the double jeopardy protection of all defendants." Such an alarmist claim is completely imaginary. Petitioner has tried to group as many incandescent claims together hoping they will reach critical mass if repeated enough. The argument is incoherent at best and does not present a reasonably articulable need for review of the interpretation of the Fifth Amendment.

There is no compelling reason to review the issue of whether to expand the interpretation of the Constitution's Fifth Amendment protection, against being twice put in jeopardy, in a case where the facts do not even meet the criteria of the standard of review suggested by Petitioner as necessary to make that innovative expansion of constitutional reach.

II.

THERE IS NO SPECIAL REASON TO REVIEW A DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS TO GRANT OR DENY DISCRETIONARY REVIEW.

There is no requirement to review a decision by the Texas Court of Criminal Appeals which, in its capacity as a court of discretionary review, chose to review some but not all of the issues Petitioner asked that court to review.[5] The Texas Court of Criminal Appeals, in its discretion, did not review the issue Petitioner presented in his Petition for Discretionary Review of whether there should be a review of the evidence based on the exculpatory evidence not presented at trial to determine if there was sufficient evidence to support the conviction. The desired review would have been based on the Texas statutory requirement that accomplice witness testimony be corroborated before it can be considered against a defendant. TEX.CODE CRIM.PROC., art. 38.14. Petitioner never suggests that the statute is repugnant to the Constitution. However, the review was conducted by the 12th Court of Appeals where they concluded that the review required by *Jackson v. Virginia* would not alter the sufficiency review previously conducted and there is no way for an appellate court to determine how a jury would weigh the new conflicting evidence. *Mitchell*, 935 S.W.2d at 539-540.

The decision of the Texas Court of Criminal Appeals not to grant discretionary review as to any issue is not a

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[5] The Court of Criminal Appeals granted review to two of the six points in Petitioner's Petition for Discretionary Review. *See* (Petitioner's App. D at 62-63).

decision that draws into question the validity of a federal statute nor is it a state statute that is repugnant to the Constitution. Petitioner has not shown that this Honorable Court has jurisdiction to review the denial of discretionary review by the Texas Court of Criminal Appeals. 28 U.S.C. § 1257(a).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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